

STATE OF INDIANA

OFFICE OF THE SECRETARY OF STATE

IN THE MATTER OF: )  
 )  
MICROVOTE GENERAL CORP. ) Cause No. 06-0003-ED  
 )  
Respondent. )

**ORDER GRANTING THE OFFICE OF THE SECRETARY OF STATE'S MOTION  
FOR SUMMARY JUDGMENT; DENYING MICROVOTE'S MOTION FOR SUMMARY  
JUDGMENT; and FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Comes now the Administrative Law Judge and, after due consideration of the exhibits, testimony and written briefs, finds:

**I. Findings of Fact**

**A. The Parties**

1. Petitioner, the Office of the Secretary of State, is an administrative body charged with the enforcement of the Indiana Election Code. IC §§ 3-11-17-3 and 3-11-17-4.
2. Respondent MicroVote is an Indiana corporation with its principal place of business in Indiana. MicroVote sells voting equipment and currently does business in forty-seven (47) Indiana Counties. *See*, April 17, 2006 Hearing Transcript, page 91.

**B. Applicable Statutory Provisions**

1. IC § 3-11-7.5 *et seq.* **Approval of Electronic Voting Systems.**

- i. IC § 3-11-7.5-1 (**Necessity for approval**)

The commission must approve any form of electronic voting system before it may be used at an election.

ii. IC § 3-11-7.5-3 (**Compliance with statutes required for approval**)

The commission may approve an electronic voting system only if the system complies with the requirements of this chapter and IC 3-11-15.

iii. IC § 3-11-7.5-4 (**Standards for approval; tests to be conducted by independent laboratory before approving system; marketing, sale, lease, or installation of voting system; expiration of approval**)

(a) The commission shall:

(1) require the vendor to have tests conducted concerning the compliance of an electronic voting system with HAVA and the standards set forth in this chapter and IC 3-11-15; and

(2) have the results of the tests evaluated by the person designated under IC 3-11-16; before determining whether to approve the application for certification of an electronic voting system.

(b) The tests required under this section must be performed by an independent laboratory accredited under 42 U.S.C. 15371. The vendor shall pay any testing expenses under this section.

(c) If the commission finds that an electronic voting system complies with this article, the commission may approve the system. The approved system then may be adopted for use at an election.

(d) **An electronic voting system may not be marketed, sold, leased, installed, or implemented in Indiana before the application for certification of the system is approved by the commission.** [Emphasis Added.]

- (e) An approval of an electronic voting system under this chapter expires on the date specified by section 28(a) of this chapter.
- iv. IC § 3-11-7.5-5 (**Proposed changes to voting system; tests to be conducted by independent laboratory before approval; criteria for approval; marketing, sale, lease, or installation of changes; expiration of approval**)
  - (a) A vendor may apply for approval of a proposed improvement or change to an electronic voting system that is currently certified by the commission. A proposed improvement or change may not be marketed, sold, leased, installed, or implemented in Indiana before the application for the improvement or change is approved by the commission.
  - (b) An application for approval of an improvement or a change must be in the form prescribed by the commission.
  - (c) The vendor applying for approval of an improvement or a change must have the improvement or change to the voting system tested by an independent laboratory accredited under 42 U.S.C. 15371. The vendor shall pay any testing expenses incurred under this subsection.
  - (d) The election division (or the person designated under IC 3-11-16) shall review the improvement or change to the voting system and report the results of the review to the commission. The review must indicate:
    - (1) whether the proposed improvement or change has been approved by an independent laboratory accredited under 42 U.S.C. 15371; and

- (2) whether the proposed improvement or change would comply with HAVA and the standards set forth in this chapter and IC 3-11-15.
  - (e) After the commission has examined and approved the application for an improvement or change to an electronic voting system, the improvement or change may be marketed, sold, leased, installed, or implemented in Indiana.
  - (f) An approval of an application under this section expires on the date specified by section 28(a) of this chapter.
- v. **IC § 3-11-7.5-7 (Voting system must meet specifications)**
- The commission may not approve the marketing, sale, lease, installation, or implementation of an electronic voting system unless the system meets the specifications in sections 8 through 19 of this chapter in IC 3-11-15.
- vi. **IC § 3-11-7.5-10 (Voting potential of system)**
- An electronic voting system must permit a voter to vote:
- (1) except at a primary election, for all the candidates of one (1) political party, for one (1) or more candidates of each political party, or for one (1) or more candidates nominated by petition;
  - (2) for as many candidates for an office as the voter may vote for, but no more;
  - (3) for or against a public question on which the voter may vote, but no other; and
  - (4) for all the candidates for presidential electors of a political party or an independent ticket at one (1) time.

vii. IC § 3-11-7.5-13 (**Accuracy in registering and counting votes**)

An electronic voting system must correctly register and accurately count all votes cast for each candidate and for or against each public question.

viii. IC § 3-11-7.5-25 (**Experimental use of system**)

The county election board may provide for the experimental use of an electronic voting system at an election in one (1) or more precincts in the county. The system may be used without a formal adoption by the county or purchase but the electronic voting system **must be approved by the commission *before* the system is implemented in *or* used by the county.** The experimental use of a system at an election in accordance with this section is valid for all purposes as if formally adopted by the county. [Emphasis Added.]

ix. IC § 3-11-7.5-28 (**Expiration of approval of voting system; renewal of approval; notice of request for renewal; conditions**)

- (a) Except as provided in subsection (g), the approval of an electronic voting system under this chapter expires October 1 of the year following the year in which presidential electors are elected under IC 3-10-2-3.
- (b) The vendor of a voting system approved under this chapter may request that the approval be renewed by filling an application with the election division.
- (c) The application described in subsection (b) must identify all counties that are currently using the voting system. Before the commission considers the application for renewal, the election division shall give notice of the

application to the circuit court clerk of each county listed in the application.

- (d) When the commission considers the application, the election division shall request comments regarding the renewal of the application from any interested person. Before acting on the application for renewal, the commission must receive a report from the person designated under IC 3-11-16 indicating that the hardware, firmware, and software included in the application for renewal of the voting system is identical to the version of the voting system previously certified by the commission.
- (e) After receiving the report under subsection (d) and comments from interested persons, the commission shall approve an application for renewal under this section if the commission finds that the voting system:
  - (1) complies with the standards prescribed under this chapter;
  - (2) has worked effectively where the system has been used; and
  - (3) has been adequately supported by the vendor of the system.
- (f) If the commission finds that a vendor has marketed, sold, leased, installed, implemented, or permitted the use of a voting system in Indiana that:
  - (1) has not been certified by the commission for use in Indiana; or
  - (2) includes hardware, firmware, or software in a version that has not been approved for use in Indiana;the commission may revoke the approval granted under this section and prohibit the vendor from marketing, leasing, or selling any voting system for a specific period not to exceed five (5) years.

- (g) A vendor **subject to subsection (f)** may continue to provide support during the period specified in subsection (f) to a county that has acquired a voting system from the vendor after the vendor certifies that the voting system to be supported by the vendor only includes hardware, firmware, and software approved for use in Indiana. [Emphasis Added.]

2. IC § 3-11-14-23 (**Voting procedure; standards to define a vote; rights of a voter in casting ballot**)

- (a) This section is enacted to comply with 42 U.S.C. 15481 by establishing uniform and nondiscriminatory standards to define what constitutes a vote on an electronic voting system.
- (b) If a voter is not challenged by a member of the precinct election board, the voter may pass the railing to the side where an electronic voting system is and into the voting booth. There the voter shall register the voter's vote in secret by indicating:
  - (1) the candidates from whom the voter desires to vote by touching a device on or in the squares immediately above the candidates' names;
  - (2) if the voter intends to cast a write-in vote, a write-in vote by touching a device on or in the square immediately below the candidates' names and printing the name of the candidate in the window provided for in write-in voting; and
  - (3) the voter's preference on each public question by touching a device above the word "yes" or "no" under the question.

- (c) If an election is a general or municipal election and a voter desires to vote for all the candidates of one (1) political party or group of petitioners, the voter may cast a straight part ticket by touching that party's device. The voter's vote shall then be counted for all the candidates under that name. However, if the voter casts a vote by touching the circle of an independent ticket comprised of two (2) candidates, the voter casts a vote by touching the circle of an independent ticket comprised of two (2) candidates, the vote shall not be counted for any other independent candidate on the ballot.
- (d) After December 31, 2005, as provided by 42 U.S.C. 15481, a voter casting a ballot on an electronic voting system must be:
  - (1) permitted to verify in a private and an independent manner the votes selected by the voter before the ballot is cast and counted;
  - (2) provided the opportunity to change the ballot or correct any error in a private and independent manner before the ballot is cast and counted, including the opportunity to receive a replacement ballot if the voter is otherwise unable to change or correct the ballot; and
  - (3) notified before the ballot is cast regarding the effect of casting multiple votes for the office and provided an opportunity to correct the ballot before the ballot is cast and counted.

3. **IC § 3-11-15-13.1 (Voting system display of candidate name and designation)**

If a voting system has the capability, the voting system must display on the medium used by the voter to cast the voter's ballot the following information for each candidate:

- (1) The name of the candidate.



- (2) A ballot number or other candidate designation uniquely associated with the candidate.
- 4. IC § 3-11-15-13.3 (**Federal voting system standards; use of voting system with expired certification**)
  - (a) This section applies after December 31, 2005.
  - (b) To be approved by the commission for use in Indiana, a voting system must meet the Voting System Standards adopted by the Federal Election Commission on April 30, 2002.
  - (c) A county may continue to use an optical scan ballot card voting system or an electronic voting system whose approval or certification expired on or before October 1, 2005, if the voting system:
    - (1) was:
      - (A) approved by the commission for use in elections in Indiana before July 1, 2003; and
      - (B) purchased by the county before July 1, 2003; and
    - (2) otherwise complies with the applicable provisions of HAVA and this article.

However, a voting system vendor may not market, sell, lease, or install a voting system described in this subsection.

- (d) As provided by 42 U.S.C. 15482, to be used in an election in Indiana, a voting system must be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the

same opportunity for access and participation (including privacy and independence) as for other voters.

- (e) As provided by 42 U.S.C. 15481, an election board conducting an election satisfies the requirements of subsection (d) if the election board provides at least one (1) electronic voting system or other voting system equipped for individuals with disabilities at each polling place.
- (f) If a voter who is otherwise qualified to cast a ballot in a precinct chooses to cast the voter's ballot on the voting system provided under subsection (e), the voter must be allowed to cast the voter's ballot on that voting system, whether or not the voter is an individual with disabilities.

5. IC § 3-11-15-20 (**Voting system; accuracy**)

- (a) A voting system must be able to record accurately each vote and be able to produce an accurate report of all votes cast.
- (b) As used in this subsection, "error rate" refers to the error rate of the voting system in counting ballots (determined by taking into account only those errors that are attributable to the voting system and not attributable to an act of the voter). As required by 42 U.S.C. 15481, a voting system must comply with the error rate standards established under section 3.2.1. of the Voting System Standards approved by the Federal Election Commission on April 30, 2002, as those standards were in effect on October 29, 2002.
- (c) The inclusion of control logic and data processing methods incorporating parity and check-sums (or equivalent error detection and correction methods) must demonstrate that the system has been designed for accuracy.

6. IC § 3-11-15-49 (**Approval required before voting system is marketed, sold, leased, installed or implemented**)

**Before** a vendor **markets, sells, leases, installs, or permits the implementation of a voting system** in Indiana, the commission **must have approved** the vendor's application for the approval of the voting system. [Emphasis Added.]

7. IC § 3-11-17 *et seq.* **Voting System Violations**

- i. IC § 3-11-17-1 (**Application**)

This chapter applies to a voting system vendor who sells, leases, installs, implements, or permits the use of a voting system in an election conducted in Indiana.

- ii. IC § 3-11-17-2 (**Sale, lease, installation, implementation, or permission for use of voting system in violation of election law; civil penalty**)

In addition to any other penalty imposed, a vendor who knowingly, recklessly, or negligently sells, leases, installs, implements, or permits the use of a voting system in an election conducted in Indiana in violation of this **title** is subject to a civil penalty under this chapter. [Emphasis Added.]

- iii. IC § 3-11-17-3 (**Civil penalty assessed by Secretary of State; maximum penalty**)

If the Secretary of State determines that a vendor is subject to a civil penalty under section 2 of this chapter, the Secretary of State may assess a civil penalty.

The civil penalty assessed under this section may not exceed three hundred thousand dollars (\$300,000), plus any investigative costs incurred and documented by the Secretary of State.

iv. IC § 3-11-17-5 (**Deposit of penalties**)

All civil penalties collected under this chapter shall be deposited with the treasurer of state in the voting system technical oversight program account established by section 6 of this chapter.

C. Definitions

1. When a word has not been defined by the legislature within the statute where it appears, then that word must be given its “common and ordinary meaning” which can be found by reference to English language dictionaries. Consolidation Coal Co. v. Indiana State Dep’t of Revenue, 583 N.E.2d 1199, 1201 (Ind.1991) (*quoting Spaulding v. International Bakers Serv.*, 550 N.E.2d 307, 309 (Ind.1990)) and Planned Parenthood of Indiana v. Carter, 854 N.E.2d 853, 866 (Ind.Ct.App.2006) (*quoting Kiel Bros. Oil Co. v. IDEM*, 819 N.E.2d 892, 902 (Ind.Ct.App.2004), *transfer denied.*)
2. The term “marketing” is defined as “the commercial functions involved in transferring goods from producer to consumer”<sup>1</sup> or “the total of activities involved in the transfer of goods from the producer or seller to the consumer or buyer, including advertising, shipping, storing, and selling.”<sup>2</sup>
3. The dictionary definition of “sale” is “the transfer of title to property from one party to another for a price; *also*: the contract of such a transaction.”<sup>3</sup> Other definitions for “sale” include: “In general, a transaction between two parties where the buyer receives goods

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<sup>1</sup> “marketing.” *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004. 27 Dec. 2006. <[Dictionary.com http://dictionary.reference.com/browse/marketing](http://dictionary.reference.com/browse/marketing)>.

<sup>2</sup> “marketing.” *Dictionary.com Unabridged (v1.1)*. Random House, Inc. 27 Dec. 2006. <[Dictionary.com http://dictionary.reference.com/browse/marketing](http://dictionary.reference.com/browse/marketing)>.

<sup>3</sup> “sale.” *Merriam-Webster's Dictionary of Law*. Merriam-Webster, Inc. 15 Feb. 2007. <[Dictionary.com http://dictionary.reference.com/browse/sale](http://dictionary.reference.com/browse/sale)>.

(tangible or intangible), services and/or assets in exchange for money”<sup>4</sup> and “The exchange of goods or services for an amount of money or its equivalent; the act of selling; An instance of selling.”<sup>5</sup>

4. The dictionary definition of “lease” is “to grant temporary possession or use of . . . to another, usually for compensation at a fixed rate.”<sup>6</sup>
5. The dictionary definition of “install” is “to connect or set in position and prepare for use.”<sup>7</sup>
6. The dictionary definition of “implement” is “to put into effect according to or by means of a definite plan or procedure”<sup>8</sup> or “to put into practical effect; carry out.”<sup>9</sup>

D. Notices of Violation

1. On April 7, 2006, the Office of the Secretary of State issued a Notice of Violation against MicroVote General Corporation. This Notice of Violation was given the Cause Number 06-0001 (hereinafter sometimes referred to as “Cause - 0001”). It alleged that MicroVote General Corporation acted in violation of IC 3-11-7.5-4(d) and/or IC 3-11-7.5-13 and/or IC 3-11-7.5-15.
2. On August 30, 2006, the Office of the Secretary of State issued a second Notice of Violation against MicroVote General Corporation. The second Notice of Violation was

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<sup>4</sup> “sale.” *Investopedia.com*. Investopedia Inc. 15 Feb. 2007. <Dictionary.com <http://dictionary.reference.com/browse/sale>>.

<sup>5</sup> “sale.” *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004. 15 Feb. 2007. <Dictionary.com <http://dictionary.reference.com/browse/sale>>.

<sup>6</sup> “lease.” *Dictionary.com Unabridged (v1.1)*. Random House, Inc. 10 Apr. 2007 <Dictionary.com <http://dictionary.reference.com/browse/lease>>.

<sup>7</sup> “install.” *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004. 10 Apr. 2007. <Dictionary.com <http://dictionary.reference.com/browse/install>>.

<sup>8</sup> “implement.” *Dictionary.com Unabridged (v1.1)*. Random House, Inc. 10 Apr. 2007 <Dictionary.com <http://dictionary.reference.com/browse/implement>>.

given the Cause Number 06-0003. It alleged that MicroVote General Corporation acted in violation of IC 3-11-7.5 *et seq.* and/or IC 3-11-17 *et seq.* The second Notice of Violation also alleges that MicroVote General Corporation's software violates the requirements of IC 3-11-7.5-9-11 and 13 and thereby violates IC 3-11-17-2.

3. Pursuant to an Agreement between the parties and an Order from Marion County Superior Court 2, dated October 2, 2006, the first Notice of Violation, Cause Number 06-0001 was voluntarily stayed by the Office of the Secretary of State. MicroVote agreed to waive any and all objections that it might otherwise make in the 06-0003 proceedings on issues covered by the stayed 06-0001 proceeding, including the issues of res judicata or law of the case. Further, it was ordered that Cause Number 06-0003 shall proceed on the schedule as previously set forth by the Administrative Law Judge.

E. MicroVote's Actions in Indiana

1. MicroVote General Corporation (hereinafter "MicroVote") sells election equipment and has sold its electronic voting system to forty-seven (47) Indiana counties.
2. Prior to the commencement of these proceedings, MicroVote has never before been subject to proceedings, neither administrative nor judicial, brought by any Indiana agency of local or State government alleging any administrative or enforcement difficulties involving its voting system.
3. On October 1, 2005, MicroVote's electronic voting systems software was decertified by operation of statute, specifically, IC § 3-11-7.5-28. After this decertification, MicroVote

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<sup>9</sup> "implement." *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004. 10 Apr. 2007. <Dictionary.com <http://dictionary.reference.com/browse/implement>>.

had no voting equipment certified for use in Indiana until April 28, 2006. (See Finding of Fact ¶.E.28.

4. As the statutory expiration date of October 1, 2005 approached, MicroVote contacted the Indiana Election Commission seeking clarification regarding IC § 3-11-7.5-28(g).
5. MicroVote received an interpretation of IC § 3-11-7.5-28(g) which was made by Dale Simmons, Co-General Counsel for the Indiana Election Commission. MicroVote asserts that it relied on this interpretation, despite a disclaimer that was placed on the bottom of the correspondence from Mr. Simmons to MicroVote that explicitly warned that a party should not rely upon the legal interpretation of any member or staff person of the Indiana Election Commission, but instead should seek guidance from the party's legal counsel if a party is unsure of the meaning or application of any statute found in the Indiana Election Code.
6. After October 1, 2005, MicroVote asserts that it was delayed in applying for and obtaining State approval/renewal regarding its electronic voting system due to several factors, some beyond its control.<sup>10</sup>
7. On October 11, 2005 the Commissioners of Shelby County signed a contract with MicroVote to purchase thirty-six (36) Infinity voting panels at a total price of One Hundred Thirteen Thousand Nine Hundred Forty Dollars (\$113,940.00) *See* Exhibits 1 & 2.<sup>11</sup> A final pricing Estimate confirming the contractual amount was provided to Shelby

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<sup>10</sup> Specifically, MicroVote was delayed in applying for and obtaining State approval/renewal regarding its electronic voting system after October 1, 2005, at least in part because national authorities (specifically the national NASED Technical Review Committee) placed a moratorium on (re)certification testing of such systems due to problems arising from other vendors in California, which moratorium was lifted and (re)certification testing allowed to resume only after NASED, EAC and ITA met on March 30, 2006 in Washington, D.C.

<sup>11</sup> Unless otherwise stated, all exhibits referenced herein are designated by the Office of the Secretary of State's Motion for Summary Judgment.

- County on November 14, 2005. *See* Exhibit 2. These thirty-six (36) panels were then ordered on November 16, 2005, invoiced on March 13, 2006, and delivered by MicroVote to Shelby County on March 20, 2006. *See* Exhibits 3, 4 and 5. A separate order for forty (40) panels was invoiced on October 31, 2005. *See* Exhibit 6.
8. On October 18, 2005 the Commissioners of Fayette County signed a contract provided by MicroVote at a total price of fifty-four thousand forty-three dollars (\$54,043.00), which included the purchase of at least twenty-two (22) Infinity units. *See* Exhibit 7. James Ries, President of MicroVote, provided a signed and notarized Affidavit on November 4, 2005 to Fayette County stating that the equipment being purchased from MicroVote was in compliance with all requirements of Indiana and federal law. *See* Exhibit 8. However, Fayette County's need exceeded that which was originally contracted for and a final pricing Estimate, in the amount of two hundred fifteen thousand one hundred fifty eight dollars (\$215,158.00), was sent to Fayette County on November 14, 2005. *See* Exhibit 9. An invoice, in the amount of two hundred fifteen thousand one hundred fifty eight dollars (\$215,158.00), for fifty (50) Infinity panels and twenty-two (22) systems was provided by MicroVote on March 13, 2006. *See* Exhibits 10 and 11.
9. On November 10, 2005 the Commissioners of Pulaski County signed a contract provided by MicroVote to purchase six (6) Infinity voting machines at a total price of seventeen thousand two hundred fifty dollars (\$17,250.00). *See* Exhibit 12. An Estimate on pricing had been sent by MicroVote on October 27, 2005 as well as a Cost Projection analysis. *See* Exhibits 13 and 14. The Order for this equipment was place by MicroVote on November 23, 2005 and Invoiced to the county on March 21, 2006. *See* Exhibits 15, 16, and 17.



10. On December 6, 2005 the Commissioners of Grant County signed a contract with MicroVote for a total price of fourteen thousand three hundred sixty dollars (\$14,360.00) which included the purchase of four (4) Infinity voting panels. *See* Exhibit 18. The cost projection and Estimate for this purchase were provided by MicroVote on November 23, 2005. *See* Exhibits 19 and 20. The equipment was then invoiced by MicroVote on February 28, 2006. *See* Exhibit 21.
11. Hamilton County received a Cost Projection from MicroVote for the purchase of fifteen (15) Infinity units on November 16, 2005 and an Estimate on November 28, 2005. *See* Exhibits 22 and 23. A contract was then signed by MicroVote on November 28, 2005 and sent to Hamilton County for a total price of ninety-three thousand two hundred thirty one dollars and eighty cents (\$93,231.80), which included the purchase of fifteen (15) Infinity panels. *See* Exhibit 24. The fifteen units were invoiced by MicroVote on March 21, 2006. *See* Exhibit 25. This was in addition to the one hundred sixty seven (167) Infinity panels that were invoiced by MicroVote on November 2, 2005 and delivered to Hamilton County on November 3, 2005. *See* Exhibit 26.
12. On February 7, 2006 the Commissioners of Marshall County signed a contract provided by MicroVote for a total price of twelve thousand six hundred sixty dollars (\$12,660.00) which included the purchase of four (4) Infinity units. *See* Exhibit 27. These units were priced by MicroVote in a Cost Projection for Marshall County on January 16, 2006 and Invoiced March 10, 2006. *See* Exhibits 28 and 29.
13. Brown County was provided with a Cost Projection prepared by MicroVote for the purchase of ten (10) Infinity units on January 23, 2006. *See* Exhibit 30. A contract for the purchase of this equipment from MicroVote in the amount of fifty-one thousand one

- hundred ninety five dollars (\$51,195.00) was then provided to Brown County by MicroVote and the County commissioners signed it on February 21, 2006. *See* Exhibit 31. Brown County was given oral affirmation that the equipment being sold to them was certified and that only certified equipment would be delivered to them. *See* Exhibit 32, Deposition Transcript of Benita Fox, Brown County Clerk, pg. 7. Twenty-three (23) total Infinities were ordered from MicroVote for the county; the first ten machines were invoiced on March 30, 2006 and April 3, 2006 and the final thirteen were invoiced on May 9, 2005. *See* Exhibits 33 and 34.
14. Knox County was provided with a Cost Projection from MicroVote for the purchase of three (3) Infinity units on February 7, 2006. *See* Exhibit 35. A contract provided by MicroVote was then signed by the Commissioners of Knox County on March 6, 2006 for the purchase of these units at a total price of nine thousand five hundred ninety seven dollars (\$9,597.00). *See* Exhibit 36. The equipment was invoiced by MicroVote on March 27, 2006. *See* Exhibit 37.
15. DeKalb County was provided with a Cost Projection from MicroVote for the purchase of three (3) Infinity units on February 9, 2006. *See* Exhibit 38. A contract was then provided by MicroVote and signed by the Commissioners of DeKalb County on February 13, 2006 for the purchase of these units at a total price of nine thousand nine hundred dollars (\$9,900). *See* Exhibit 39. The equipment was invoiced by MicroVote on March 23, 2006. *See* Exhibit 40.
16. Bartholomew County was provided with a Cost Projection from MicroVote for the purchase of thirteen (13) Infinity units on February 24, 2006. *See* Exhibit 41. A contract

provided by MicroVote was then signed by the Commissioners of Bartholomew County on March 6, 2006. *See* Exhibit 42.

17. The Infinity panels that were marketed, sold, leased, installed, and or implemented during the above time frame were equipped with the versions of software and firmware that was automatically decertified after October 1, 2005. *See* Exhibit 43, Deposition of James Ries, page 28, lines 21-25; page 29, line 1; page 38, lines 16-23. All invoiced equipment would have been delivered prior to or within approximately one week of invoice date per company policy. *See* Exhibit 43, Deposition of James Ries, page 27, lines 3-7. The new firmware version 3.07 was installed in all forty-seven counties sometime between March 1, 2006 and April 18, 2006. *See* Exhibit 43, Deposition of James Ries, page 10, lines 13-19.
18. Indiana law requires that public tests be conducted on voting systems which are to be used in an Indiana election no later than fourteen (14) days before any election. These tests are conducted to test the operating accuracy of the electronic voting system. *See* generally, IC 3-11-14.5-1 *et seq.*
19. Public tests of MicroVote voting equipment occurred in all 47 counties in which it does business sometime between March 22, 2006 and April 18, 2006 as statutorily mandated by IC 3-11-14.5 *et seq.*
20. The public tests of the Infinity panels in Hendricks County and Kosciusko County were performed on March 22, 2006. *See* Exhibits 44 and 45. The public test of the Infinity panels in Clinton County was performed on March 28, 2006. *See* Exhibit 46. The public tests of the Infinity panels in Greene County and Owen County were performed on March 29, 2006. *See* Exhibits 47 and 48. The public tests of the Infinity panels in Dubois

- County, Orange County and Warrick County were performed on April 4, 2006. *See* Exhibits 49, 50 and 51. The public tests of the Infinity panels in Daviess County, Knox County and Perry County were performed on April 5, 2006. *See* Exhibits 52, 53 and 54.
21. A Notice of Violation was issued by the Office of the Secretary of State on April 7, 2006. This Notice set a hearing on the matter for April 17, 2006, and was given Cause No. 06-0001-ED (hereinafter referred to as Cause - 06-0001). *See* Exhibit 55, Notice of Violation.
22. The public test of the Infinity panels in Pulaski County was performed on April 7, 2006. *See* Exhibit 56. The public tests of the Infinity panels in Starke County was performed on April 8, 2006. *See* Exhibit 57. The public tests of the Infinity panels in Blackford County, Decatur County, and Fayette County were performed on April 10, 2006. *See* Exhibits 58, 59, and 60. The public tests of the Infinity panels in Brown County, Clay County, Marshall County, Noble County, Pike County, Putnam County, and Spencer County were performed on April 11, 2006. *See* Exhibits 61-67. The public tests of the Infinity panels in Grant County, Huntington County, Miami County, Tipton County, and Wells County were performed on April 12, 2006. *See* Exhibits 68-72. The public tests of the Infinity panels in Rush County and Shelby County were performed on April 13, 2006. *See* Exhibits 73 and 74. The public tests of the Infinity panels in Hamilton County, Lake County, and Sullivan County were performed on April 17, 2006. *See* Exhibits 75, 76, and 77. The public test of the Infinity panels in Adams County was performed on April 18, 2006. *See* Exhibit 79.
23. A Hearing took place in Cause No. 0001 before the Secretary of State on April 17, 2006. Evidence was taken at this hearing. *See* Exhibit 78, Transcript of Hearing.

24. By the time of the April 17, 2006 hearing before Secretary of State Rokita took place, the national moratorium on (re)certification testing by the appropriate authorities had been lifted and an independent evaluator accredited under 42 U.S.C. § 15371 (CIBER, Inc.) had completed two of three phases of qualification testing of MicroVote's system's software.
25. A hearing took place before the Indiana Election Commission on April 19, 2006. Evidence was taken at this hearing. *See* Exhibit 80, Transcript of Hearing.
26. The independent testing authority known as CIBER issued a report on April 22, 2006, stating that firmware version 3.07 met the federal testing standards. *See* Exhibit 43, Deposition of James Ries, page 13, lines 23-25; page 14, lines 1-25; page 15, lines 1-25; page 16, lines 1-9.
27. On Saturday April 22, 2006, MicroVote learned that the 3.07 firmware had a problem with the function relating to split precincts. *See* Exhibit 43, Deposition Transcript of James Ries, page 13, lines 23-25; page 14, lines 1-2. MicroVote officials did not inform any Indiana election officials of this problem before the April 28, 2006 certification or the May 2, 2006 primaries. Instead, MicroVote shut down the function completely. *See* Exhibit 43, Deposition Transcript of James Ries, page 13, lines 23-25; page 14, lines 1-25, page 15, lines 1-25; page 16, lines 1-9. MicroVote did not notify the Indiana Election Commission of the system's deficiency or submit its application for certification of the firmware that corrected this problem until late July 2006. *See* Exhibit 43, Deposition Transcript of James Ries, page 16, lines 4-9.

28. On April 28, 2006, based on the information that was provided to the Commission, the Indiana Election Commission voted to grant certification to MicroVote's electronic voting system, version 3.07 firmware.
29. MicroVote's decision to shut down this function rendered the voting machine incapable of being used in a general election, and thus the firmware was in violation of the Indiana Election Code. See Exhibit 43, Deposition Transcript of James Ries, page 13, lines 23-25; page 14, lines 1-25; page 15, lines 1-25; page 16, lines 1-9.
30. The split-precinct function was necessary for a general election but was not necessary for a primary election. However, the April 28, 2006 certification granted to MicroVote certified that the machine, at the time of the issuance of the certification, was operational for BOTH the primary and general election.
31. On May 2, 2006, the Indiana primary elections took place, with forty-seven (47) counties using MicroVote equipment with version 3.07 firmware.
32. A second Notice of Violation was issued by the Office of the Secretary of State on August 30, 2006. It covered the alleged violations committed by MicroVote leading up to the May 2006 primary in all of the forty-seven (47) counties in which it does business in Indiana and new issues brought to light leading into the general election. This case was assigned Cause No. 06-0003-ED (hereinafter sometimes referred to as "Cause - 0003"). See Notice of Violations, Exhibit 81.
33. MicroVote informed the Indiana Election Commission in a letter dated August 25, 2006 of the software deficiency in its voting system software, stated that it had updated its software to correct this deficiency, and sought to have the updated software approved by the Indiana Election Commission. The Indiana Election Commission imposed a number

of conditions for its approval. MicroVote met these conditions and, accordingly, the Indiana Election Commission approved the updated version of MicroVote's software on October 2, 2006, with a retroactive approval date of September 18, 2006.

F. Procedural Outline

1. This action is governed by the Administrative Orders and Procedures Act ("AOPA").  
*See* IC § 3-11-17-4.
2. Under the AOPA, motions for summary judgment are controlled by IC § 4-21.5-3-23.
3. Outline of Events Relating to the 1<sup>st</sup> Notice of Violation, Cause Number 06-0001.
  - i. On April 7, 2006, the Office of the Secretary of State issued a Notice of Violation against MicroVote General Corporation. This Notice of Violation was given the Cause Number 06-0001. It alleged that MicroVote General Corporation acted in violation of IC 3-11-7.5-4(d) and/or IC 3-11-7.5-13 and/or IC 3-11-7.5-15.
  - ii. A Hearing took place in Cause No. 0001 before the Secretary of State on April 17, 2006. Evidence was taken at this hearing. *See* Exhibit 78, Transcript of Hearing.
  - iii. On May 9, 2006, counsel for MicroVote filed a Petition for Disqualification or Motion for Withdrawal of the Secretary of State as Administrative Law Judge.
  - iv. On May 10, 2006, Administrative Law Judge (hereinafter "ALJ") Rokita issued an Entry and Order reopening the proceedings and setting the matter for a hearing on May 17, 2006 at 1:30 p.m.

- v. On May 12, 2006, counsel for MicroVote filed a Petition for Judicial Review in Marion County Superior Court<sup>12</sup> which raised “significant issues as to the bias or prejudice of the Administrative Law Judge.” Subsequently, on May 16, 2006, counsel for MicroVote filed a Motion for Continuance of Hearing Pending Judicial Review in the administrative proceeding that was before ALJ Rokita.
- vi. On June 30, 2006, Secretary of State Rokita stepped down from his position as the Administrative Law Judge and appointed J. Lee McNeely as the Administrative Law Judge in the -0001 matter. ALJ McNeely has served in that capacity in both the -0001 and -0003 matters since this appointment.<sup>13</sup>
- vii. On July 31, 2006, the newly appointed ALJ, J. Lee McNeely, sent a letter to each of the parties, as well as all other required individuals or entities, providing the recipients with certain information that was statutorily required. This letter also served as notice to the parties that the ALJ had set the matter for a Pre-Hearing Conference on August 14, 2006.<sup>14</sup>
- viii. On August 9, 2006, counsel for MicroVote filed a Petition for Expedited Ruling on Renewed Motion for Summary Judgment, or Alternatively, Motion to Dismiss.

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<sup>12</sup> This matter was given the cause number 49D12-06-05-PL-019858. This matter was ultimately dismissed due to the appointment of ALJ McNeely.

<sup>13</sup> Various Motions and Briefs were filed with the former ALJ, ALJ Rokita and these pleadings can be found in the ALJ’s case file, however to the extent that such pleadings have not been discussed thus far, they will not be discussed in this order because this order will focus only on the actions and decisions of the current ALJ.

<sup>14</sup> This letter contained all statutory requirements as provided by the Indiana Code.



- ix. On August 10, 2006, counsel for the Office of the Secretary of State submitted a Status Summary, as requested by the ALJ.
- x. On August 11, 2006, counsel for MicroVote filed a Motion for Protective Order.
- xi. On August 14, 2006, counsel for the Office of the Secretary of State filed its Response to MicroVote's Motion for Protective Order. Likewise, counsel for MicroVote submitted its Motion for Scheduling.
- xii. On August 14, 2006, ALJ McNeely met with the parties in Rome 156 of the Indiana State House at 10:00 a.m. for a Pre-Hearing Conference. At this Pre-Hearing Conference, the ALJ issued an Order Setting Schedule, issued an order denying MicroVote's Motion for Scheduling<sup>15</sup>, and issued an Order Partially Granting MicroVote's Motion for a Protective Order.
- xiii. On August 20, 2006, counsel for the Office of the Secretary of State filed its Motion to Compel Discovery Responses.
- xiv. On August 24, 2006, ALJ McNeely issued an Order Denying MicroVote's Motion for Summary Judgment or Alternatively Motion to Dismiss.
- xv. On August 25, 2006, counsel for MicroVote filed a Verified Petition for Judicial Review and Request for a Stay in Marion County Superior Court.<sup>16</sup>
- xvi. On August 30, 2006, counsel for MicroVote submitted its Response to the Office of the Secretary of State's Motion to Compel Discovery Responses.
- xvii. On August 31, 2006, counsel for the Office of the Secretary of State filed a Motion for Sanctions for Failure to Appear at a Noticed Deposition by a Party.

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<sup>15</sup> This Motion was denied by ALJ McNeely verbally at the Pre-Hearing Conference which was attended by representatives for all of the parties. There is no paper order denying this order.

- xviii. On September 1, 2006, ALJ McNeely met with the parties, via telephone conference call, for a Pre-hearing Conference.
- xix. On September 5, 2006, counsel for the Office of the Secretary of State submitted a Notice of Filing in Related Case.
- xx. On September 7, counsel for MicroVote filed its Response to Motion for Sanctions, Objection to Further Proceedings and Request for Stay Pending Court Order. Likewise, counsel for the Office of the Secretary of State filed a Request to Serve Subpoenas for Depositions on Bartholomew County Clerk, Ms. Norma J. Trimpe and Knox County Clerk, Ms. Brenda J. Hall.<sup>17</sup>
- xxi. On September 7, 2006, the ALJ met with the parties at 2:00 p.m. at the offices of the ALJ for a Pre-Hearing Conference. At this Conference, the ALJ issued an Order Amending the Schedule; an Order Denying Microvote's Request for a Stay; an Order Granting the Office of the Secretary of State's Motion to Compel; and an Order Partially Granting MicroVote's Motion for Clarification of the Issues and Setting Discovery Deadlines.
- xxii. On September 11, 2006, counsel for MicroVote provided the ALJ with a copy of pleadings filed in the related Marion County action.
- xxiii. On September 12, 2006, counsel for MicroVote provided the ALJ with a copy of additional pleadings filed in the related Marion County Action. Also, on September 12, 2006, Peter Campbell King entered his Limited Appearance, on behalf of Norma Trimpe.

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<sup>16</sup> The related case was assigned the Cause Number 49D02-0608-PL-035347.

<sup>17</sup> These Subpoenas were issued by the ALJ on September 7, 2006.

- xxiv. On September 15, counsel for the Office of the Secretary of State provided the ALJ with a copy of a pleading filed in the related Marion County Action. Also, Judge Kenneth Johnson, of the Marion County Superior Court No. 2, issued an Order Granting MicroVote's Motion to Quash and set the matter for hearing on September 21, 2006 at 2:00 p.m.
  - xxv. On September 18, 2006, ALJ McNeely met with the parties, via telephone conference call, for a Pre-hearing Conference.
  - xxvi. On September 20, 2006, counsel for the Office of the Secretary of State provided the ALJ with a copy of pleadings filed in the related Marion County Action.
  - xxvii. On September 22, 2006, the ALJ attended the parties hearing before Judge Ken Johnson of Marion County Superior Court 2.
4. Outline of Events Relating to the 2<sup>nd</sup> Notice of Violation, Cause Number 06-0003.
- i. On August 30, 2006, the Office of the Secretary of State issued a second Notice of Violation against MicroVote General Corporation. The second Notice of Violation was given the Cause Number 06-0003. It alleged that MicroVote General Corporation acted in violation of IC 3-11-7.5 *et seq.* and/or IC 3-11-17 *et seq.* The second Notice of Violation also alleges that MicroVote General Corporation's software violates the requirements of IC 3-11-7.5-9-11 and 13 and thereby violates IC 3-11-17-2.
  - ii. On August 31, 2006, Secretary of State Todd Rokita issued a Notice of Appointment of J. Lee McNeely as Administrative Law Judge of Cause Number 06-0003.

- iii. On August 31, 2006, counsel for the Office of the Secretary of State submitted its Appearance before the ALJ, as well as its Request for a Pre-Hearing Conference to Establish Case Management Deadlines.
- iv. On September 7, 2006, counsel for MicroVote submitted its Appearance before the ALJ, as well as its Motion for Clarification of Charges/Issues, Request for Pre-hearing Conference and Suggestion of Dates.
- v. On September 7, 2006, the ALJ issued an Order Partially Granting MicroVote's Motion for Clarification of Charges/Issues and Setting Discovery Deadlines.
- vi. On September 18, 2006, counsel for the Office of the Secretary of State filed its Preliminary Issues and Contentions, as requested by the ALJ.
- vii. On September 19, 2006, the ALJ issued, via email and hard copy, a clarification of the misunderstandings between the parties relating to the Notice of Violation, the Preliminary Issues and Contentions, and the Final Issues and Contentions.
- viii. On September 22, 2006, counsel for MicroVote filed its Response to the Preliminary Issues and Contentions.
- ix. Pursuant to an Agreement between the parties and an Order from Marion County Superior Court 2, dated October 2, 2006, the first Notice of Violation, Cause Number 06-0001 was voluntarily stayed by the Office of the Secretary of State and MicroVote agreed to waive any and all objections it may make in the Cause Number 06-0003 proceedings on issues covered by the stayed -0001 proceeding, including res judicata or law of the case as defenses therein. Further, it was ordered that Cause Number 06-0003 shall proceed on the schedule as previously set forth by the Administrative Law Judge.

- x. On October 11, 2006, counsel for the Office of the Secretary of State submitted its Amended Preliminary Issues and Contentions, which were filed pursuant to the October 2<sup>nd</sup> Agreement between the parties. Also, on October 11, 2006, counsel for MicroVote filed a Motion to Adjust Discovery Cut Off to Comply with the ALJ's Order of September 7, 2006.
- xi. On October 12, 2006, counsel for the Office of the Secretary of State submitted its response to MicroVote's Motion to Adjust Discovery Cut Off to Comply with the ALJ's Order of September 7, 2006.
- xii. On October 13, 2006, the ALJ issued an Order Granting MicroVote's Motion to Adjust Discovery Cut Off.
- xiii. On October 13, 2006, counsel for MicroVote submitted its Response to the Office of the Secretary of State's Requests for Admissions.
- xiv. On October 17, 2006, counsel for the Office of the Secretary of State submitted its Third Party Interrogatories and Requests for Production. Also on October 17, 2006, ALJ sent a letter to each of the parties scheduling the matter for a Pre-hearing Conference to be held at 10:00 a.m. on November 17, 2006 in Room 156 of the Indiana Statehouse.
- xv. On October 19, 2006, counsel for the Office of the Secretary of State submitted its Motion for Summary Judgment on the Calculation of Penalties.
- xvi. On October 21, 2006, counsel for Microvote submitted its Motion for Declaratory Judgment, Motion for Temporary Restraining Order and Preliminary Injunction and Motion for Sanctions.

- xvii. On October 24, 2006, the ALJ issued an Order Denying MicroVote's Motion for Declaratory Judgment, Motion for Temporary Restraining Order and Preliminary Injunction and Motion for Sanctions.
- xviii. On October 25, 2006, counsel for MicroVote submitted its Response to Amended Preliminary Issues and Contentions.
- xix. On October 26, 2006, counsel for the Office of the Secretary of State submitted its brief in Opposition to MicroVote's Motion for Declaratory Judgment, Motion for Temporary Restraining Order and Preliminary Injunction and Motion for Sanctions.
- xx. On October 17, 2006, counsel for the Office of the Secretary of State submitted its Motion to Issue Discovery.
- xxi. On October 30, 2006, counsel for MicroVote submitted a Motion for Protective Order.
- xxii. On October 31, 2006, the ALJ issued an Order Denying Part and Granting Part of MicroVote's Motion for Protective Order and also an Order to Issue Subpoenas.
- xxiii. On November 2, 2006, the ALJ issued an Order Setting a Hearing of the Office of the Secretary of State's Motion for Summary Judgment on the Calculation of the Penalties for Monday, December 4, 2006 at 1:00 p.m. at the office of the ALJ.
- xxiv. On November 6, 2006, counsel for MicroVote submitted a Motion for Change of Time for Hearing Set on December 4, 2006.
- xxv. On November 7, 2006, the ALJ issued an Order Rescheduling Hearing on the Office of the Secretary of State's Motion for Summary Judgment on the Calculation of the Penalties for Monday, December 4, 2006 at 3:30 p.m. at the

Indiana Statehouse. Also, on November 7, 1006, counsel for the Office of the Secretary of State requested that the ALJ issue a Subpoena to Appear on the Director of the Allen County Election Board, Ms. Pamela Finlayson.

- xxvi. On November 10, 2006, counsel for the Office of the Secretary of State submitted a Motion for a Scheduling Change.<sup>18</sup>
- xxvii. On November 14, 2006, counsel for MicroVote filed its Objection to the Suggestion of a Hearing Date on December 19, 2006.
- xxviii. On November 17, 2006, the parties met with the ALJ at 10:00 a.m. at the Indiana State House for a Pre-hearing Conference. While at this pre-hearing conference, the ALJ issued an Order for Scheduling Change.<sup>19</sup>
- xxix. On November 22, 2006, counsel for MicroVote submitted its Response to the Office of the Secretary of State's Motion for Summary Judgment on the Calculation of Damages, its Designation in Support of its Response to the Office of the Secretary of State's Motion for Summary Judgment on the Calculation of Damages, its Motion to Strike Inadmissible Hearsay from the Office of the Secretary of State's Motion for Summary Judgment on the Calculation of Damages, and the Affidavit of James Ries.
- xxx. On November 28, 2006, the ALJ issued an Order Denying MicroVote's Motion to Strike Indadmissible Hearsay from the Office of the Secretary of State's Motion for Summary Judgment on the Calculation of Damages.

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<sup>18</sup> This Motion requested that the due date for the Final Issues and Contentions be enlarged until December 8, 2006 in conjunction with the discover cut-off date.

<sup>19</sup> This Order set the new deadline for the Office of the Secretary of State to file its Final Issues and Contentions of Law for December 8, 2006.

- xxxi. On December 1, 2006, counsel for the Office of the Secretary of State submitted its Reply to MicroVote's Response to its Motion for Summary Judgment on the Calculation of Penalties.
- xxxii. On December 4, 2006, at 3:30 p.m. at the Indiana State House, the ALJ conducted a hearing on the Office of the Secretary of State's Motion for Summary Judgment on the Calculation of the Penalties.
- xxxii. On December 7, 2006, counsel for MicroVote submitted its response to the Office of the Secretary of State's Second Set of Requests for Admissions and Interrogatories.
- xxxiii. On December 8, 2006, counsel for the Office of the Secretary of State submitted the Final Issues and Contentions.
- xxxiv. On December 15, 2006, counsel for MicroVote submitted its Response to the Final Issues and Contentions.
- xxxv. On December 16, 2006, the ALJ issued an Order Stating that the Office of the Secretary of State's Final Issues and Contentions are not Substantially Different from the Preliminary Issues and Contentions and are Pled with Adequate Specificity.
- xxxvi. On December 20, 2006, the ALJ notified the parties of his change of address and phone number, effective January 1, 2007.



- xxxvii. On December 21, 2006, the ALJ issued an Order Denying the Office of the Secretary of State's Motion for Summary Judgment on the Issue of Calculation of the Penalties.<sup>20</sup>
- xxxviii. On January 12, 2007, counsel for the Office of the Secretary of State submitted its (1) Motion for Summary Judgment, (2) Brief in Support of Motion for Summary Judgment, and (3) Designation of Materials in Support of the its Motion for Summary Judgment. Likewise, counsel for MicroVote submitted its Motion for Summary Judgment and Legal Memorandum in Support Thereof.
- xxxix. On February 9, 2007, counsel for MicroVote submitted a Motion to Strike Inadmissible Evidence from the Office of the Secretary of State's Motion for Summary Judgment, as well as its Response to the Office of the Secretary of State's Motion for Summary Judgment.
- xl. On February 12, 2007, counsel for the Office of the Secretary of State's Office submitted its Brief in Opposition to MicroVote's Motion for Summary Judgment.
- xli. On February 27, 2007, counsel for the Office of the Secretary of State submitted its Reply Brief to MicroVote's Response to the Office of the Secretary of State's Motion for Summary Judgment and its Supplemental Designation of Evidence. Likewise, counsel for MicroVote submitted its Reply Brief Regarding its Motion for Summary Judgment and its Motion to Strike Inadmissible Evidence from the

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<sup>20</sup> The ALJ found that any penalties which may be imposed were limited to \$300,000 per election cycle. However, since there were 2 election cycles in question (the 2006 Primary and the 2006 General Election), any penalty imposed by the ALJ can not exceed \$300,000 per election cycle or \$600,000 total, plus any investigative costs incurred and documented by the Office of the Secretary of State.

Office of the Secretary of State's Brief in Opposition to MicroVote's Motion for Summary Judgment and Related Factual Disputes and Designation of Evidence.

- xl.ii. On March 6, 2007, counsel for MicroVote submitted its Reply Regarding its Motion to Strike Inadmissible Evidence from the Office of the Secretary of State's Motion for Summary Judgment.
- xl.iii. On March 9, 2007, counsel for the Office of the Secretary of State submitted its Response to MicroVote's Motion to Strike Exhibits from the Office of the Secretary of State's Brief in Opposition to MicroVote's Motion for Summary Judgment.
- xl.iv. On March 9, 2007, at 9:00 a.m., the ALJ conducted a hearing on the Parties Cross-motions for Summary Judgment as well as any other motions pending before the ALJ at his offices in Shelbyville, Indiana.
- xl.v. On April 9, 2007, counsel for the Office of the Secretary of State submitted its Proposed Findings of Fact and Conclusions of Law.
- xl.vi. On April 18, 2007, counsel for MicroVote submitted its Proposed Findings of Fact and Conclusions of Law.
- xl.vii. On April 24, 2007, the ALJ issued an Order Denying in Part and Granting in Part Respondent MicroVote's Motions to Strike Inadmissible Evidence.
- xl.viii. On May 11, 2007, counsel for Microvote submitted its Supplemental Brief Regarding Attorney's Fees.

## **II. Conclusions of Law**

### **A. Jurisdiction and Appropriateness of Summary Judgment in Administrative Proceedings**

1. The ALJ has jurisdiction over the parties and the subject matter of this administrative action.
2. All findings of fact are incorporated by reference as conclusions of law, and all conclusions of law are incorporated by reference as findings of fact.
3. The granting of summary judgment is within this ALJ's discretion and is measured by two factors:
  - i. Whether there are any genuine issues of material fact; and
  - ii. Whether the moving party is entitled to judgment as a matter of law.

The standard for summary judgment that governs this case is found in Trial Rule 56 and its parallel in the Administrative Orders and Procedures Act, codified at IC § 4-21.5-3-23. The AOPA states in pertinent part: "A party may, at any time after a matter is assigned to an administrative law judge, move for a summary judgment in the party's favor as to all or any part of the issues in a proceeding. [] The judgment sought shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law." IC § 4-21.5-3-23.

4. This cause involves the interpretation of various statutes within the Election Code, which is an appropriate and well-sustained issue to be resolved by a motion for summary judgment. "Where, as here, the relevant facts are not in dispute and the interpretation of a statute is at issue, such statutory interpretation presents a pure question of law for which summary judgment disposition is particularly appropriate." Pike Tp. Educational Foundation, Inc. v. Rubenstein,

831 N.E.2d 1239 (Ind. App. 2005), *citing* Lake Central Sch. Corp. v. Hawk Dev. Corp., 793 N.E.2d 1080, 1084 (Ind. Ct. App. 2003), *trans denied*.

B. Indiana Code § 3-11-17-2 penalizes all violations of the Election Title by vendors.

1. Indiana Code § 3-11-17 et seq. applies to any vendor who “sells, leases, installs, implements, or permits the use of a voting system in an election conducted in Indiana.” IC § 3-11-17-1. MicroVote is such a vendor, as its sole business is providing election equipment, and it currently services forty-seven Indiana counties as clients. *See* Findings of Fact, Section I.A.2; April 17, 2006 Hearing Transcript, page 91.

2. The chapter states that a vendor who “knowingly, recklessly, or negligently sells, leases, installs, implements, or permits the use of a voting system in an election conducted in Indiana in violation of this title” is subject to a civil penalty to be assessed by the Secretary of State under IC § 3-11-17-3. IC § 3-11-17-2.

3. Any violation of Title 3 is covered by the penalty set forth in Chapter 17 of Article 11.

C. MicroVote has committed at least fifty-seven (57) violations that fall within Title 3.

1. IC § 3-11-7.5-4(d) states that “[a]n electronic voting system may not be marketed, sold, leased, installed, or implemented in Indiana before the application for certification of the system is approved by the commission.” IC § 3-11-7.5-4(d).

- i. As of October 1, 2005, MicroVote did not have any electronic voting systems that were certified in the State of Indiana, since its system that was in use up to that point was statutorily decertified on October 1, 2005 and the new system was not completed until March and not certified by the Indiana Election Commission until April 28, 2006. *See* IC § 3-11-7.5-28(a); Findings of Fact ¶ E.28.

- ii. Accordingly, MicroVote did not have a product that it could legally market, sell, or lease anywhere in Indiana from October 1, 2005 to April 28, 2006.
  - iii. Despite this fact, MicroVote marketed and sold uncertified equipment prior to the May 2006 primary election by (a) signing new sales contracts in ten counties, (b) sending out numerous pricing estimates for purchase of its equipment and (c) emailing counties with quotes and estimates for future purchases. *See generally*, Exhibits 1 through 42 and 83 through 124.
2. MicroVote sold, invoiced, and delivered multiple Infinity units that were equipped with firmware that was not certified, all acts which are within the definition of the marketing of its product. *See* Exhibits 1 through 42 and 83 through 124.
3. Steve Shamo, salesman for MicroVote in Indiana, confirmed the sales of “new machines” to “Pulaski, Bartholomew, Fayette, Brown, Knox, Shelby, Morgan, DeKalb, Grant, Hamilton, and Marshall” counties between the dates of “October 1, 2005 and April 28, 2006.” Exhibit 125-Deposition Transcript of Steve Shamo, page 22.
4. These sales included somewhere between one hundred (100) and one hundred sixty-five (165) panels. *Id.*, page 23. The admitted sales of uncertified equipment are violations of the Indiana Election Code and subject MicroVote to liability under IC § 3-11-17-2 because uncertified election equipment cannot be sold by a vendor in Indiana.
5. A violation of Title 3 also occurs when “an electronic voting system [is] . . . installed or implemented in Indiana before the application for certification of the system is approved by the commission.” IC § 3-11-7.5-4(d).
6. MicroVote installed a new updated firmware version in all forty-seven counties with which it does business prior to receiving certification from the Indiana Election Commission.

*See*, Exhibit 125 - Deposition Transcript of Steve Shamo, page 12; Exhibit 41- Deposition Transcript of James Ries, pages 7-8.

7. Version 3.07 was installed on Infinity equipment prior to its public test date in every county that MicroVote services. *See*, Exhibit 125 - Deposition Transcript of Steve Shamo, pages 13-14. Accordingly, the forty-seven counties performed public tests on uncertified equipment.<sup>21</sup> Although the systems received last-minute certification by the Indiana Election Commission, the systems were uncertified prior to that time.

8. Public tests are an integral part of the election process, and therefore part of “an election” even though they are not conducted on Election Day. A public test of a county’s voting equipment is statutorily mandated so that the voters are assured that the systems work before voters cast their vote upon it, and it must be completed at least fourteen (14) days prior to the election. *See* IC § 3-11-14.5 *et. seq.* The forty-seven counties in which MicroVote does business performed these public tests prior to the May 2006 Primary Election with uncertified equipment which was sold, marked and installed by MicroVote.<sup>22</sup> Therefore, MicroVote “permitted the use of” uncertified equipment in an election by allowing its customers to public test uncertified firmware and software components.

9. The installation and implementation, including testing, of uncertified equipment is a violation of Title 3 of the Indiana Code.

10. Another violation of Title 3 occurred prior to the November 2006 General Election. Version 3.07, which had been certified by the Indiana Election Commission prior to the May

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<sup>21</sup> A public test of a county’s voting equipment is statutorily mandated. *See*, IC 3-11-14-5 *et. seq.*

<sup>22</sup> *See* The Office of the Secretary of States’s Brief in Support of Motion for Summary Judgment, pages 9-10 and 15-16, referencing designated materials showing public test dates (exhibits 44 through 77 and 79) and

2006 Primary Election and installed in all 47 counties serviced by MicroVote, was incapable of allowing for accurate straight-ticket voting which is a necessary prerequisite for any general election. *See*, IC § 3-11-7.5-10 and Exhibit 135 - Deposition Transcript of Steve Shamo, page 15.

- i. The certification granted to Microvote on April 28, 2006, certified that the Microvote machines, at the time of the issuance of the certification, were operational for both the primary and general election.
- ii. As early as April 22, 2006, MicroVote knew that version 3.07 was not operational for both the primary and general election, but concealed this fact from the Indiana Election Commission until at least late July or early August, 2006.
- iii. Prior to notifying the Indiana Election Commission of the straight-ticket voting deficiency, via letter on August 25, 2006, MicroVote installed the updated firmware and/or software correcting the straight-ticket voting deficiency on all MicroVote electronic voting systems used in Indiana.
- iv. After receiving MicroVote's August 25, 2006 letter and its application for certification of its new version of firmware/software, the Indiana Election Commission imposed numerous conditions upon the certification of this new firmware/software and on October 2, 2006, after MicroVote had met these conditions, the Indiana Election Commission approved the updated MicroVote's updated version with a retroactive approval date of September 18, 2006.

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testimony of Microvote officials that the uncertified equipment had been used in every county for public testing (exhibits 43 and 125).

D. MicroVote's Various Violations of Title 3 of the Election Code are Punishable by Civil Penalty under IC § 3-11-17-3.

1. The applicable damages section of the Indiana Election Code is codified at IC § 3-11-17-3: "If the Secretary of State determines that a vendor is subject to a civil penalty under section 2 of this chapter, the Secretary of State may assess a civil penalty. The civil penalty assessed under this section may not exceed three hundred thousand dollars (\$300,000), plus any investigative costs incurred and documented by the Secretary of State." IC § 3-11-17-3.

2. This ALJ has ruled that MicroVote can only be assessed civil penalties of up to three hundred thousand dollars (\$300,000) in the aggregate per election, plus any investigative costs incurred and documented by the Secretary of State. *See*, Exhibit 126 - Order Denying the Office of the Secretary of State's Motion for Summary Judgment on the Issue of Calculation of the Penalties.

3. In 2006 there was both a primary election and a general election, each of which required the use of properly certified equipment and software.

E. The Phrase "An Election" is a broader phrase that encompasses a greater span of time than merely "Election Day."

1. MicroVote argues that the statutory phrase "in an election" only refers to Election Day. That argument is unpersuasive. The legislature has defined "Election Day" as "the calendar day on which an election is held." IC § 3-5-2-18. Since "Election Day" was defined therein, the legislature would have (and did) use it throughout the code wherever the legislative intent was to address only the day of the election. Had the legislature intended for IC § 3-11-17-2 to be restricted solely to violation which occurred on "Election Day" itself, then the legislature would



have used the pre-defined term “election day,” not the broader and more encompassing time period “in an election.”

2. When a word is not specifically defined (as is the case with an “election” here), the entire statute must be examined and the undefined word must be given its “common and ordinary meaning . . . unless doing so would deprive the statute of its purpose of effect.” Consolidation Coal Co. v. Indiana Dep’t of State Revenue, 583 N.E.2d 1199, 1201 (Ind. 1991). To aid in this analysis, the Court “may consult English language dictionaries to ascertain the plain and ordinary meaning of a statutory term.” Planned Parenthood of Indiana v. Carter, 854 N.E.2d 853, 866 (Ind. Ct. App. 2006).

- i. The Merriam-Webster Dictionary of Law<sup>23</sup> defines “election” as “an act or process of electing.” Black’s Law Dictionary has a similar definition: “the process of selecting a person to occupy a position or office, usu[ally] a public office.”<sup>24</sup>
- ii. The “process” of electing public officials in Indiana takes months to complete, from candidate filings to ballot creation to public testing of election equipment to absentee voting and verification of final vote tallies.
- iii. A “process,” by common understanding, is a multi-step endeavor and does not indicate a single day’s accomplishments.
- iv. Notably, the dictionary also defines “election day” separate and apart from just the term “election.”<sup>25</sup>

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<sup>23</sup> Merriam-Webster Dictionary, 1996, as provided at <http://www.m-w.com/dictionary>.

<sup>24</sup> Black’s Law Dictionary, Second Pocket Edition, West Law Group, St. Paul Minnesota, 2001.

<sup>25</sup> Merriam-Webster’s Dictionary of Law, 1996, defining “election day” as “a day legally established for the election of public officials; especially: the first Tuesday after the first Monday in November in an even year

- v. The concept of “noscitur a sociis” provides that the meaning of a doubtful word may be ascertained by reference to the meaning of other words associated with it.” State v. D.M.Z., 674 N.E.2d 585, 588 (Ind. Ct. App. 1997).
  - vi. The clear association between “election” and “Election Day” allows us to infer that when one is defined to specifically encompass only one day - the calendar day of the election - then the other term must carry another, presumptively broader, meaning. This is consistent with the common understanding of the term.
3. There are multiple examples throughout the election code of the specific use of the defined term “Election Day,” such as the fact that an absentee ballot must be received by the close of polls on “election day.” IC § 3-11-10-3. Also, directions that are given by the code for the “poll list that has been used in the precinct on election day” are specific; that section did not refer to the poll lists used in “an election” but rather, on “election day.” IC § 3-11-3-20. It follows logically that when the code refers to anything other than “election day,” it must have a different meaning than the one already established for that term, and this is consistent with the statutory construction concepts discussed above. The phrase “in an election” then indicates a different span of time than just election day.
4. The ALJ concludes that the legislature has used the phrase “an election” in a broader sense than the defined term “election day.” Otherwise, the statute would only be effective for violations that occur on two specific calendar days of a year in which an election is held.
5. The clear intent of the legislature was to prevent and punish the illegal sale, marketing, leasing, implementing, installing, or use of voting machines in Indiana.

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designated for national elections in the United States and observed as a legal holiday in many states.”  
<http://www.m-w.com/dictionary>.

- i. If MicroVote's interpretation of this statute is accepted, the result will be that a vendor can commit any of the prohibited acts at any time during the election process, but then be absolved of any wrongdoing so long as the system is granted a last-minute certification before a vote is cast on election day.
- ii. Such a result could lead to a disregard of this statute's strictures by non-compliant vendors, who would hope that they could avoid any penalties for their actions if they could gain last minute approval of their system. The integrity of the electoral process, and the voters' faith in that process, cannot be allowed to hang by so slender a thread.

F. MicroVote may not rely on a "Grandfather Provision" or a "Mistake of Law" to excuse its actions.

1. IC § 3-11-7.5-28(g) states: "A vendor subject to subsection (f) may continue to provide support during the period specified in subsection (f) to a county that has acquired a voting system from the vendor after the vendor certifies that the voting system can be supported by the vendor only includes hardware, firmware, and software approved for use in Indiana." IC § 3-11-7.5-28(g).

- i. MicroVote argues that this section is a "grandfather provision" which excuses all of the company's actions under the premise of "ongoing support." *See* MicroVote's Response to the Office of the Secretary of State's Motion for Summary Judgment, pages 14-16, 23-24.
- ii. However, the section clearly references subsection (f) twice, and that section provides that "if the commission finds that a vendor has marketed, sold, leased, installed, implemented, or permitted the use of a voting system in Indiana that: (1)

has not been certified by the commission for use in Indiana; or (2) includes hardware, firmware, or software in a version that has not been approved for use in Indiana; the commission may revoke the approval granted under this section and prohibit the vendor from marketing, leasing, or selling any voting system in Indiana for a specific period not to exceed five (5) years.” IC § 3-11-7.5-28(f).  
Emphasis Added.

- iii. For the “ongoing support” provision of subsection (g) to apply, then, the vendor must have already been subject to the penalty that subsection (f) gives the Indiana Election Commission the authority to impose. MicroVote has never had this prohibition placed on them by the Indiana Election Commission,<sup>26</sup> so subsection (g) does not apply to MicroVote in this instance.
  - iv. Uncertified equipment was sold, uncertified software was installed, and there was apparent deception prior tot the last-minute certification in this cause. Any safe harbor or grandfather-type provision was not meant to protect these activities, which clearly violate the Election Code. Thus, MicroVote’s extended argument that if a “vendor who the Indiana Election Commission has banned for five years” could provide ongoing support, then surely a vendor who was just waiting on certification could do the same is faulty. The statute (IC § 3-11-7.5-28(g)) did not and does not apply to MicroVote General Corporation, and no analogy will entitle it to such a safe harbor.
2. MicroVote argues that as the statutory expiration date of its electronic voting machines approached, it requested an interpretation of IC § 3-11-7.5-28(g) from the Indiana Election

Division. It argues that its reliance upon the interpretation of the statute it received absolves it from any allegation of wrongdoing. This argument is unpersuasive.

- i. Dale Simmons, co-counsel for the Indiana Election Division provided MicroVote with his interpretation of the statute. However, Mr. Simmons's interpretation also contained the express disclaimer that a party should not rely upon the legal interpretation of any member or staff person of the Indiana Election Commission, but instead should consult with independent legal counsel if a party is unsure of the meaning or application of any statute found in the Indiana Election Code.
- ii. Thus, MicroVote's alleged reliance upon Mr. Simmons's interpretation was unreasonable and imprudent, because MicroVote ignored the express disclaimer stating that it should consult with independent counsel for any interpretation of the meaning or application of any statute found in the Indiana Election Code.

G. Violations occurred at the time when MicroVote's actions were committed.

1. MicroVote General Corporation violated the Indiana Election Code, IC § 3-11-7.5-4(d), by marketing its uncertified election equipment in forty-seven (47) counties. *See*, Paragraphs I(E)(7)-(22) & (29) *supra*.
2. MicroVote General Corporation violated the Indiana Election Code, IC § 3-11-7.5-4(d), by selling its uncertified equipment in ten (10) counties. *See*, Paragraphs I(E)(7)-(22) & (29) *supra*.
3. MicroVote General Corporation violated the Indiana Election Code, IC § 3-11-7.5-4(d), by installing its uncertified equipment in forty-seven (47) counties. *See*, Paragraphs I(E)(7)-(22) & (29) *supra*.

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<sup>26</sup> See, Exhibit 44 - Deposition Transcript of James Ries, page 69.

4. MicroVote General Corporation violated the Indiana Election Code, IC § 3-11-7.5-4(d), by implementing its uncertified equipment in forty-seven (47) counties. *See*, Paragraphs I(E)(7)-(22) & (29) *supra*.

5. MicroVote General Corporation violated the Indiana Election Code, IC §§ 3-11-7.5-10, 3-11-7.5-13, 3-11-15-20, 3-11-15-13.1 and 3-11-14-23(d), by installing election systems in forty-seven (47) counties which were inadequate to conduct a general election in Indiana since they would not allow for straight-ticket voting. *See*, Paragraphs I(E)(26)-(32) *supra*.

6. These violations are subject to a civil penalty under IC § 3-11-17-3.

H. The Office of the Secretary of State is entitled to up to \$600,000, plus investigative costs, in damages for MicroVote's multiple violations of the Election Code during the primary election and general election cycles of 2006.

1. Since this Cause (06-0003-ED) involves allegations of violations in two separate elections, the total amount of the penalty imposed may be Six Hundred Thousand Dollars (\$600,000), plus any investigative costs incurred and documented by the Secretary of State. *See*, Exhibit 126 - Order Denying the Office of the Secretary of State's Motion for Summary Judgment on the Issue of Calculation of the Penalties, page 3.

**III. Order Granting the Office of the Secretary of State's  
Motion for Summary Judgment and Denying MicroVote's  
Motion for Summary Judgment**

1. This Order relies in part on hearsay evidence. However, all hearsay evidence is supported and supplemented by other admissible evidence. Thus, any such reliance is appropriate in an administrative hearing on a motion for summary judgment, pursuant to the Administrative Orders and Procedures Act, specifically IC § 4-21.5-3-26.

2. This Order is not based solely on hearsay evidence, also in conformity with the requirement of the Administrative Orders and Procedures Act. Rather, any hearsay evidence relied upon is but one component in a large body of evidence that helps form the basis for this decision.

3. The Administrative Orders and Procedures Act grants both parties the ability to object to this Order issued by the ALJ by filing said objection with the final authority: “(d) To preserve an objection to an order of an administrative law judge for judicial review, a party must not be in default under this chapter and must object to the order in a writing that:

- (i) identifies the basis of the objection with reasonable particularity; and
- (ii) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days (or any longer period set by statute) after the order is served on the petitioner.” IC § 4-21.5-3-29.

The ultimate authority in this action is Secretary of State Todd Rokita.

4. The Office of the Secretary of State’s Motion for Summary Judgment is hereby **GRANTED**, and MicroVote General Corporation’s Motion for Summary Judgment is hereby **DENIED**.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

I. MicroVote General Corporation shall pay a civil penalty in the amount of Two Hundred Fifty Thousand Dollars (\$250,000.00), which shall be deposited with the Treasurer of State in the voting system technical oversight program account as required by IC § 3-11-17-5.

II. MicroVote shall pay the costs of investigation to the Office of the Secretary of State.

III. Within thirty (30) days of this Order, the Office of the Secretary of State shall submit an accounting of investigative costs, including attorneys' fees incurred, for this court to review and upon which to base a further Order.

IV. Within thirty (30) days of this Order, both parties shall submit briefs addressing the issue of whether attorney's fees are properly recoverable in this action.

SO ORDERED THIS 21<sup>st</sup> DAY OF MAY, 2007.

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J. Lee McNeely, Administrative Law Judge

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